

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:	Zhang et al
Application No.:	10/827494
Filed:	April 19, 2004
For:	IMPROVED CATHETER BALLOON MOLD FORM AND MOLDING PROCESS
Examiner:	Monica Anne Huson
Group Art Unit:	1791

Mail Stop Appeal-Brief Patents

Commissioner for Patents

P.O. Box 1450

Alexandria, VA 22313-1450

Docket No.: S63.2B-11346-US01

SUPPLEMENTAL REPLY BRIEF

This is in response to the Supplemental Examiner's Answer filed June 2, 2009 and the Order Remanding Appeal to Examiner mailed June 9, 2009.

The "Supplemental Examiner's Answer" mailed June 2, 2009 is objected to as improper.

37 CFR § 41.43 Examiner's response to reply brief.

(a)

(1) After receipt of a reply brief in compliance with § 41.41, the primary examiner must acknowledge receipt and entry of the reply brief. In addition, the primary examiner may withdraw the final rejection and reopen prosecution or may furnish a supplemental examiner's answer responding to any new issue raised in the reply brief.

(2) A supplemental examiner's answer responding to a reply brief may not include a new ground of rejection.

(b) If a supplemental examiner's answer is furnished by the examiner, appellant may file another reply brief under § 41.41 to any supplemental examiner's answer within two months from the date of the supplemental examiner's answer.

(c) Extensions of time under § 1.136(a) of this title for patent applications are not applicable to the time period set forth in this section. See § 1.136(b) of this title for extensions of time to reply for patent applications and § 1.550(c) of this title for extensions of time to reply for *ex parte* reexamination proceedings.

The proper grounds for a Supplemental Examiner's Answer are limited in to "any new issue raised in the reply brief." 37 CFR 41.43(a)(1).

In this case the Supplemental Examiner's Answer is a repetition of the original Examiner's Answer, except for corrections to the statements of the involved claims due to the intervening cancellation of claims 3 and 21 under *Ex parte Gebhardt* (See Office Communication of March 12, 2009). The Supplemental Examiner's Answer does not mention the Reply Brief, much less address a new issue raised in the reply brief. Thus it is really a substitute or corrected Examiner's Answer, not a proper Supplemental Examiner's Answer. Designating it as a Supplemental Examiner's Answer is contrary to law and has arbitrarily caused an increase the applicant's expense, without purpose. The remand order establishes that the filing of the Supplemental Examiner's Answer has also caused an unnecessary delay in resolution of this appeal. Under these circumstances the Supplemental Examiner's Answer is improper under the Administrative Procedure Act. It should be stricken in a precedential action that instructs Examiners as to the proper use of Supplemental Examiner's Answers.

If the Board does enter and consider the Supplemental Examiner's Answer, it is submitted it can only do so as a replacement for the Examiner's Answer mailed 8/22/2008. In such event the Applicants Reply Brief filed 10/16/2008 already stands in reply to the Supplemental Examiner's Answer with the following modifications to be applied to that Reply Brief:

- 1.) All references to the "Examiner's Answer" should then be taken as referring to the Supplemental Examiner's Answer with pagination references remaining the same except as specified in items 2.) and 3.), below.

- 2.) P. 2, line 1, the reference to page 3 of the Examiner's Answer should then be taken as referring to page 4 of the Supplemental Examiner's Answer.
- 3.) P. 4, line 11, the reference to pages 5 and 7-8 of the Examiner's Answer should then be taken as referring to page 5 and 7 of the Supplemental Examiner's Answer.

The Examiner's rejection should be rejected for the reasons stated in the Brief on Appeal and the Reply Brief already of record in this case.

Respectfully submitted,
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Date: July 17, 2009

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